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TREASURY FOR DO/JMACLAUGHLIN, USDOC FOR ITA/JKOZLOWICKI  
USTR FOR JKALLMER, OPIC FOR RO'SULLIVAN

E.O. 12958: N/A

TAGS: [EINV](#) [EFIN](#) [ETRD](#) [ELAB](#) [KTDB](#) [PGOV](#)

SUBJECT: REQUEST FOR INVESTMENT CLIMATE STATEMENT, 2009

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SUMMARY AND ACTION REQUEST  
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¶1. All Posts/American Institute in Taiwan (AIT) worldwide should respond with their 2009 Investment Climate Statements via front channel cable and unclassified email by January 15, 2009. This tasker has been cleared with regional bureaus, S/ES, and interagency.

¶2. In the context of U.S. bilateral and multilateral initiatives, the Investment Climate Statement (ICS) is a public document that provides essential information to Washington agencies and private investors and business alike about a nation's investment regime. It is both a stand-alone document and also part of the USG's Country Commercial Guide to assist U.S. companies interested in doing business overseas.

¶3. The Departments of State, Commerce and Agriculture have elected to establish a deadline of January 15. This deadline date will continue to apply for future years' submissions, which will be published on a calendar year basis (in January). Among other advantages, this will result in a deadline for the ICS that does not conflict with summer transfer season.

¶4. In addition to the information in paragraph 15, Department invites voluntary submission of particularly pertinent information. For example, significant investor interest in one or more areas of the local economy, major changes in the investment code, or ongoing investment disputes having systemic implications might be reason for brief treatment. Such information can be especially helpful to potential U.S. investors, and also provides material Washington agencies can draw upon in preparing for bilateral meetings, etc.

¶5. The guidelines in paragraph 15 offer illustrative examples and questions covering the sort of issues that embassies/AIT should address. Department recognizes that for many posts, not all of the questions in paragraph 15 will necessarily be relevant. The ICS should be divided into the following categories:

- Openness to Foreign Investment
- Conversion and Transfer Policies
- Expropriation and Compensation
- Dispute Settlement
- Performance Requirements and Incentives
- Right to Private Ownership and Establishment
- Protection of Property Rights
- Transparency of the Regulatory System
- Efficient Capital Markets and Portfolio Investment
- Political Violence
- Corruption
- Bilateral Investment Agreements
- OPIC and Other Investment Insurance Programs
- Labor
- Foreign Trade Zones/Free Trade Zones
- Foreign Direct Investment Statistics

END SUMMARY  
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## PURPOSE OF THE INVESTMENT CLIMATE STATEMENT

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¶6. One of the goals of U.S. policy is to encourage governments/authorities to adopt open investment regimes. The ICS can serve as a basis for engaging host governments/authorities in a dialogue on reforming and modernizing investment regimes. It can also provide Washington agencies and Post/AIT with a framework for discussing with the host government/authorities and international financial institutions steps to improve the country/economy's investment regime. The ICS also serves as the basic document to prepare USG positions in a variety of fora.

¶7. U.S. bilateral investment treaties (BIT) and investment chapters of U.S. free trade agreements (FTAs) incorporate the principles of national treatment, non-discrimination, liberal capital transfer, prompt and adequate compensation in the event of an expropriation, adequate dispute settlement mechanisms, and avoidance of trade-distorting performance requirements. These principles, along with the other topics discussed in an ICS, will be important for those countries that desire to negotiate a BIT or FTA with the United States. As such, the ICS is especially useful to Washington agencies when the host country/economy has requested or begun negotiation of a BIT or FTA with the United States.

¶8. The ICS also provides information about the investment regime to potential U.S. investors in the host country/economy, to help them assess business risks. It is therefore a key tool in our effort to support U.S. business overseas and is an essential addition to the broader information provided in the Country Commercial Guide. The ICS is included in the country Commercial Guides also prepared by Posts/AIT and published by the Department of Commerce.

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## PREPARATION OF 2009 INVESTMENT CLIMATE STATEMENT

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¶9. Embassies/AIT should update the Investment Climate Statement (ICS) in accordance with the instructions that follow. Please note that the report begins with those issues affecting the initial decision to invest before moving on to the treatment of established investors. While embassies should discuss at least briefly each of the major topics, the questions under any topic are offered only as illustrative examples of the issues that might aid the reader's understanding. Embassies/AIT should not/not respond in question and answer format. Obviously, some questions will be inappropriate for some economies. This submission will meet Embassy's/AIT ICS reporting requirement for 2009 and will constitute the ICS portion of the Country Commercial Guide (CCG), which was tasked separately (see State 119784).

¶10. The ICS should be a frank, concise, self-contained statement, without reference to other material previously sent or published elsewhere. We recognize that some Posts/AIT have previously submitted information similar to that requested here, and that some of this information is also provided by Posts/AIT through USTR's National Estimate Report on Foreign Trade Barriers. Nevertheless, due to our need for standardization and desire to provide potential investors with comprehensive and easily accessible information, we ask that you resubmit the information and not simply refer to previous reporting. Please coordinate responses among economic, commercial, political, and consular sections, as well as with representatives at Post of other agencies that may have relevant information (Treasury, Commerce, USAID, USDA).

¶11. We thank those Posts that have provided extensive coverage on investment disputes, which has helped ensure that such issues are noted in briefing materials for senior USG officials. Posts/AIT should not/not provide details in the ICS of such ongoing disputes, but should instead give a clear description of the systemic problems of the investment regime.

¶12. Please send the ICS by unclassified cable to the

Departments of State (Office of Investment Affairs -- EB/IFD/OIA), Treasury, Commerce, and USTR by January 15, 2009. Please include "OPIC", "KTDB" and "USTR" in the TAGS line, and list as addressees "USDOC WASHDC" and "CIMS NTDB WASHDC". Posts are also requested to insert the ICS into the CCG using the special instructions that will be provided in the CCG instruction cable (which will be tasked septel or reftel State 119784). Please do not overlook this requirement.

¶13. Finally, Posts should also send the ICS in Microsoft Word format via email on the unclassified system in Microsoft Word format to J. Nathaniel Hatcher (backup: Gregory N. Hicks). Please do not send the ICS in Microsoft Word format on the classified system. We encourage Posts/AIT to distribute the final report to visiting business missions and resident representatives of the International Financial Institutions, and to Post the ICS on Post/AIT internet websites. Please direct general questions on any of these instructions by e-mail or telephone to EB/IFD/OIA (J. Nathaniel Hatcher, 202-647-9453, or Gregory N. Hicks, 202-736-4365).

¶14. To the extent it is aware of classified investment climate information that could be of interest (for example, to OPIC in underwriting decisions), Post/AIT is encouraged to provide this information on the classified system as a separate cable for attention of State and other relevant agencies.

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QUESTIONS FOR THE INVESTMENT CLIMATE STATEMENT  
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15.A.1. Openness to Foreign Investment

-- Describe the general government/authorities' attitude toward foreign direct investment.

-- Cite the major laws/rules affecting incoming foreign investment through acquisitions, mergers, takeovers, and Greenfield (starting from nothing) investments.

-- Does the judicial system uphold sanctity of contracts?

-- Note any overall economic or industrial strategy that has discriminatory effects on foreign-owned investors.

-- Are there general limits on foreign ownership or control, and if so, are waivers available?

-- Does the country have one or more processes to screen foreign investments? Describe the review process, including timing, legal authority for the reviews, and government entities that participate in the reviews?

-- What are the criteria for determining whether an investment is subject to review (e.g., control, sector, value, etc.)? Is filing mandatory?

-- What is the purpose of the screening mechanism (e.g., national security effect, net economic benefit, consistency with national interest)?

-- What are the possible outcomes of the review (e.g., prohibition, divestiture, mitigation agreements, etc.)? What are the criteria for determining the outcome?

-- Who makes the decision on the outcome? What is the appeal process, if any?

-- Identify whether the same or any other entities review transactions for anti-competition concerns (whether domestic or international in nature).

-- Identify any sector specific restrictions that apply to foreign investment. What is the nature of the restriction (e.g., prohibition, equity caps, licensing, etc.)?

-- In countries with investment climates that are generally closed, which sectors are more open to foreign direct investment (FDI)?

-- Identify major sectors/matters in which foreign investors are denied national treatment (i.e. the same treatment as domestic firms) or MFN treatment (i.e. the same treatment as the most favored foreign investor).

-- In countries/economies with ongoing privatization programs, how are foreign investors treated in those programs? At what stage are foreign investors allowed to participate in privatization programs? Are bidding criteria clear and is the process transparent?

-- Is there any discrimination against foreign investors at the time of the initial investment or after the investment is made, such as through special tax treatment, access to licenses, approvals, or procurement?

-- Are there laws or regulations specifically authorizing private firms to adopt articles of incorporation or association which limit or prohibit foreign investment, participation, or control?

-- Are there any other practices by private firms to restrict foreign investment, participation in, or control of domestic enterprises?

-- Posts are encouraged to provide brief analyses of investment trends and the impact of policies (especially related to economic reform and investment liberalization efforts) and economic conditions on foreign direct investment in host countries/economies.

#### A.2. Conversion and Transfer Policies

-- Are there any restrictions on converting or transferring funds associated with an investment (including remittances of investment capital, earnings, loan repayments, lease payments) into a freely usable currency and at a legal market clearing rate?

-- Have there been any recent changes or are there plans to change remittance policies which have tightened or relaxed access to foreign exchange for investment remittances?

-- Is there difficulty in obtaining foreign exchange?

-- What is the average delay period currently in effect for remitting investment returns such as dividends, return of capital, interest and principal on private foreign debt, lease payments, royalties and management fees through normal, legal channels? If delays over sixty days are common, what are the reasons for such delays?

-- Can investors remit through a legal parallel market including one utilizing convertible negotiable instruments (such as dollar-denominated host government bonds issued in lieu of immediate payments in dollars)? Is there a limitation on the inflow or outflow of funds for remittances of profits, debt service, capital, capital gains, returns on intellectual property, or imported inputs?

-- Please note: in obtaining this information, it is important to go beyond official bank and government sources to the actual experience of American or other foreign investors, since there may be discrepancies between the stated policy and its implementation.

#### A.3. Expropriation and Compensation

-- For what reasons does the government/authority expropriate property? Does the government/authorities offer compensation at the time of expropriation? How have investors viewed the amount of compensation offered? Are claimants thwarted in their efforts to have claims heard?

-- Have there been any expropriatory actions in the recent past or policy shifts which would lead the Embassy/AIT to believe there may be expropriatory actions in the near future? Are there any tendencies of the host government/authorities to discriminate against U.S. investments, companies or representatives in expropriation?

-- Are there certain sectors (e.g., mining, energy, banking, telecommunications, large land holdings, etc.) that are more at risk for expropriatory or similar actions?

-- Are there laws that force local ownership? If so, in what sectors?

-- Please include instances of "creeping expropriation" or governmental action tantamount to expropriation, such as confiscatory tax regimes, that might warrant special investigation (particularly by OPIC prior to offering coverage).

#### A.4. Dispute Settlement

-- Review the government/authority's record of handling investment disputes and summarize the extent and nature of the problem.

-- Have there been investment disputes over the past few years involving U.S. or other foreign investors or contractors in host country? Do these disputes reflect a pattern?

-- Describe the country/economy's legal system. Are there effective means for enforcing property and contractual rights? Is there government/authority interference in the court system? Are judgments of foreign courts accepted and enforced by the local courts? Does the country/economy have a written and consistently applied commercial law? Does the country/economy have a written and consistently applied bankruptcy law? If so, what rights do creditors (including foreign creditors) have under bankruptcy law? Are monetary judgments usually made in the investor's currency or local currency?

-- Does the government/authority accept binding international arbitration of investment disputes between foreign investors and the state/authority? Do the courts recognize and enforce foreign arbitral awards? Is international arbitration accepted as a means for settling investment disputes between private parties? Is there a domestic arbitration body within the host economy?

-- Is host country/economy a member of or does it plan to become a member of the international center for the settlement of investment disputes (International Centre for the Settlement of Investment Disputes (ICSID) - also known as the Washington Convention) and/or the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards? If so, is there specific legislation providing for enforcement under the 1958 New York Convention and for the enforcement of ICSID awards?

#### A.5. Performance Requirements/Incentives

-- Does the host government/authority maintain any measures that it has notified the WTO to be inconsistent with TRIMs requirements? Does the host government/authority maintain any measures that are alleged to violate the WTO's TRIMs text?

-- If there are performance requirements or incentives, are they applied uniformly to both domestic and foreign investors, and within those categories, are they applied systematically or on a case-by-case basis?

-- Describe investment incentives (e.g., grants, tax deferrals, special access to credit, import quota exceptions, concessionary financing or pricing of land or other transferable assets) available to foreign investors and whether any favored treatment is given to foreign investors.

Indicate to what extent incentives are specified in law or regulation or made available in an ad hoc manner. Identify any performance requirements linked to incentives.

-- Are performance requirements imposed as a condition for establishing, maintaining or expanding the investment, or for access to tax and investment incentives?

-- Is there a requirement that investors purchase from local sources or export a certain percentage of output, or only have access to foreign exchange in relation to their exports?

-- In the case of foreign investments, is there a requirement that nationals own shares, that the share of foreign equity be reduced over time, or that technology be transferred on certain terms?

-- Does the government/authority impose "offset" requirements, whereby major procurements are approved only if the foreign supplier invests in manufacturing, R&D, or service facilities in the host economy related to the items being procured?

-- Are there government/authority-imposed conditions on permission to invest, including location in specific geographical area, specific percentage of local content (goods and services) or local equity, substitution for imports, export requirements or targets, employment of host country nationals, legal requirements to use specific employment agencies, technology transfer, or the local sources of financing?

-- Describe any enforcement procedures for performance requirements. Include available information on host country/economy's stated intentions to maintain, increase or decrease requirements. Are investors required to disclose proprietary information to governments/authorities as part of the regulatory approval process?

-- Are U.S. and other foreign firms able to participate in government/authority financed and/or subsidized research and development programs on a national treatment basis? If not, what are the restrictions? Please provide as much detail as possible, e.g. any differences between de jure and de facto practice.

-- Are there any discriminatory or excessively onerous visa, residence, or work permit requirements, or similar requirements inhibiting foreign investors' mobility?

-- Identify discriminatory or preferential export policies and import policies affecting foreign investors. Include if relevant tariff barriers, non-tariff barriers and other measures such as import price controls.

#### A.6. Right to Private Ownership and Establishment

-- Is there a right of foreign and domestic private entities to establish and own business enterprises and engage in all forms of remunerative activity?

-- Is there a right of private entities to freely establish, acquire, and dispose of interests in business enterprises?

-- Is competitive equality the standard applied to private enterprises in competition with public enterprises with respect to access to markets, credit, and other business operations, such as licenses and supplies?

#### A.7. Protection of Property Rights

-- Are secured interests in property, both movable and real, recognized and enforced? (essentially, does the concept of a mortgage exist?) And, if so, is there a recognized and reliable system of recording such security interests?

-- Is there a legal system that protects and facilitates acquisition and disposition of all property rights, such as land, buildings, and mortgages?

-- Is there adherence to key international agreements on intellectual property rights?

-- Is there adequate protection for: intellectual property, patents, copyrights, trademarks, trade secrets, semiconductor chip layout design?

-- Have adequate steps been taken to implement and enforce the WTO TRIPS agreement? Has host government signed and ratified the WIPO internet treaties?

#### A.8. Transparency of the Regulatory System

-- Does the government/authority use transparent policies and effective laws to foster competition and establish "clear rules of the game"?

-- Do tax, labor, environment, health and safety, and other laws and policies distort or impede investment?

-- Are bureaucratic procedures, including those for licenses and permits, sufficiently streamlined and transparent, or is unnecessary red tape a problem?

-- Are there informal regulatory processes managed by nongovernmental organizations or private sector associations, and if so, is there discrimination against foreign investors within such processes?

-- Are proposed laws and regulations published in draft form for public comment? Are there other opportunities for comment on proposed laws and regulations?

-- Are legal, regulatory, and accounting systems transparent and consistent with international norms?

-- Are there private sector and/or government/authority efforts to restrict foreign participation in industry standards-setting consortia or organizations?

#### A.9. Efficient Capital Markets and Portfolio Investment

-- Do policies facilitate the free flow of financial resources to support the flow of resources in the product and factor markets?

-- Is credit allocated on market terms? Are foreign investors able to get credit on the local market?

-- Does the private sector have access to a variety of credit instruments?

-- Is there an effective regulatory system established to encourage and facilitate portfolio investment?

-- What are the estimated total assets of the country/economy's largest banks?

-- Is the banking system sound? If not, what percentage of the total asset base is estimated as non-performing?

-- Are there "cross-shareholding" and "stable shareholder" arrangements used by private firms to restrict foreign investment through mergers and acquisitions? (This refers to a system in which corporations have long-term interrelationships with each other that result in few shares actually trading freely on the market.)

-- With respect to private firms' defenses to prevent hostile takeovers, are such measures typically designed to protect against all potential hostile takeovers or primarily foreign hostile takeovers? If the measures can be used against all hostile takeovers, are the measures in fact employed most commonly to prevent hostile takeovers by foreign investors?

#### A.10. Political Violence

-- Have there been incidents over the past few years involving politically motivated damage to projects and/or installations? (Note: the time frame is intentionally flexible. Posts should include any incidents that have had a continuing impact on the investment environment, disinvestment, higher risk premiums on capital, and increased insurance costs might be used as indicators of continuing impact). Is the environment in host country/economy growing increasingly politicized such that civil disturbances could be more likely?

-- Are there any nascent insurrections, belligerent neighbors or other politically motivated activities?

(NOTE: We recommend Posts/AIT ensure that responses to this section are consistent with the existing consular information sheets. END NOTE)

#### A.11. Corruption

-- Does the host country/economy have laws, regulations, and penalties to combat corruption effectively?

-- If so, are they enforced? Are such measures impartially applied or do foreign investors or any other group, such as local officials, receive disproportionate attention?

-- Has the country/economy signed and ratified the UN Anticorruption Convention? Is the country/economy a signatory of the OECD Convention On Combating Bribery?

-- Is the country/economy a participant in any other local or regional anti-corruption initiative(s)?

-- Have U.S. firms identified corruption as an obstacle to foreign direct investment?

-- In what areas or sectors is corruption most pervasive: government procurement, transfers, performance requirements, dispute settlement, regulatory system, or taxation?

-- Is giving or accepting a bribe a criminal act? If so, what are the penalties?

-- Are senior government officials taking anti-corruption efforts seriously, or are they part of the problem (if the latter, to what extent)?

-- Is a bribe by a local company to a foreign official a criminal act?

-- Can a local company deduct a bribe to a foreign official from taxes?

-- What government agency is responsible for combating corruption?

-- Do any international (e.g., Transparency International), regional or local nongovernmental "watchdog" organizations operate in the country/economy?

#### A.12. Bilateral Investment Agreements

-- List countries/economies that have bilateral investment protection agreements (as opposed to investment insurance agreements such as OPIC) or treaties with host country/economy or other treaties on investments, including FTAs with investment chapters. If available, please send a copy via unclassified pouch of any agreements or treaties that have come into force since the last ICS submission to EB/IFD/OIA, unless they have already been posted in full on the UNCTAD website.

-- Does host country have a bilateral investment treaty or a bilateral taxation treaty with the U.S.? Are there other taxation issues of concern to U.S. Investors?

#### A.13. OPIC and other investment insurance programs



-- Describe status and potential for operation of the U.S. Overseas Private Investment Corporation's (OPIC) programs in host country/economy. Is host country/economy a member of or plan to become a member of the Multilateral Investment Guarantee Agency (MIGA)?

-- In the event OPIC should pay an inconvertibility claim, the local currency accepted by OPIC would be made available, pursuant to the bilateral agreement providing for the OPIC program, to the Embassy/AIT on a priority basis for USG expenses. What is the estimated annual U.S. dollar value of local currency likely to be used by the Embassy/AIT and/or other U.S. institutions in the host country/economy? At what exchange rate (e.g., official, financial, legal parallel in-country or parallel market in a third country) does Embassy/AIT purchase local currency? What is the likely risk over the next year for devaluation or depreciation of that rate?

#### A.14. Labor

-- Describe labor availability and note any shortages or surpluses of special labor skills. Also describe general labor-management relations, host government/authority adherence to ILO convention protecting worker rights, differential treatment of labor in foreign trade zones or free ports, policies encouraging or requiring hiring of local nationals, and the effects of labor factors on use of technology.

#### A.15. Foreign Trade Zones/Free Ports

-- Describe laws and effective policies for any areas designated as duty-free import zones and whether foreign-owned firms have same investment opportunities as host country/economy entities.

#### A.16. Foreign Direct Investment Statistics

-- Include data for recent years on value of foreign direct investment (position/stock, i.e., the total value in USD of foreign direct investment in place in the host country/economy, and annual direct investment capital flows) by country/economy of origin and by industry sector destination.

-- Please note that statistics on deal approvals do not equate to foreign direct investment, especially since the projects may not fully materialize. Such data on contracts for foreign-invested projects should either be omitted or accompanied by explanatory notes on the limited reliability of the data.

-- Specify source of statistics and any significant characteristics or limitations of data (e.g. whether the stock data are valued at historical cost or at market).

-- Provide comparable data on host country/economy's direct investment abroad (stock and flow data by country of destination), both in local currency and USD terms.

-- To facilitate FDI country comparison, Post is also requested to estimate current FDI stock as a percentage of GDP and FDI inflows as percentages of GDP.

-- Please provide a list of major foreign direct investments (with an estimate of current value in USD where available) by U.S. companies and other nations' companies. Useful sources for this information may be the host country/economy Chambers of Commerce.

¶17. We appreciate that this is an extensive tasking, and thank you in advance for your efforts, particularly in view of the workload and resource constraints faced by most embassies/AIT. Please do not hesitate to contact us if you have any questions or concerns (contact info at Para 13).

¶18. Minimize considered.

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